

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SER:DEM:WAS:TL-N-7583-98  
KEChandler

date: FEB 24 1999

to: [REDACTED], Case Manager, [REDACTED]

from: Associate District Counsel, Delaware-Maryland District,  
Washington, D.C.

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subject: [REDACTED] - [REDACTED] Reorganization  
Effect on Representation

As discussed by telephone this morning, this is a supplement to our February 8, 1999 response to your request for advice regarding the proper party to deal with concerning the [REDACTED] consolidated group's income tax liabilities for the years following [REDACTED]'s [REDACTED] corporate reorganization which we discussed by telephone this morning. As mentioned in that response, the National Office was reviewing the response and the following reflects their comments.

DISCLOSURE STATEMENT

THIS DOCUMENT MAY CONSTITUTE RETURN INFORMATION SUBJECT TO I.R.C. SECTION 6103. IT MAY ALSO CONTAIN CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES, AND IF PREPARED IN CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT PRIVILEGE. ACCORDINGLY, THE EXAMINATION, APPEALS, OR COUNSEL RECIPIENT OF THIS DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATIVE DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, COUNSEL OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT, AND MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

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PRIOR CONCLUSIONS

Based on coordination with the National Office, in our February 8, 1999 memorandum we advised you as follows:

1. Old [REDACTED] is the proper party to execute Form(s) 872 to extend the statute of limitations. Form(s) 872 and 977 executed by New [REDACTED] should also be obtained to extend the statute of limitations as to its primary and transferee liability.
2. Old [REDACTED] is the proper party to execute Form(s) 870 reflecting any partial or complete settlement of proposed adjustments. Form(s) 2045 executed by New [REDACTED] should also be obtained to reflect its agreement to such settlement.
3. Any notice of deficiency should be sent to Old [REDACTED]. A notice of transferee liability should be sent to New [REDACTED].
4. Disclosure relating to the former members of the [REDACTED] consolidated group or the newly formed current parent of those former members in requesting information or discussing proposed adjustments is not limited. We recommend that, consistent with the agreement between Old [REDACTED] and New [REDACTED], a Power of Attorney be obtained from Old [REDACTED] designating New [REDACTED] its agent for purposes of the on-going examination.

The National Office has advised us that they agree with the analysis and conclusions set forth in our February 8, 1999 response with the following modifications/comments:

- In our response we recommended that Forms 870 and 872 executed by New [REDACTED] also be obtained. The National Office has concluded that it is not necessary to obtain New [REDACTED]'s execution of these forms. However, there is no problem should Exam want New [REDACTED] to also execute the Forms 870 and 872.

- Regarding the "Disclosures" section of our response, the National Office cautions that the limited disclosure authority bestowed under section 6103(k)(6) and implementing Treasury Regulations is narrowly circumscribed and only permits the IRS to disclose tax information in order to obtain information necessary to accomplish a number of enumerated tax administration activities. In terms of the advice, therefore, while section 6102(k)(6) may support disclosures to obtain "necessary information," it would not support disclosures to "discuss issues."

Authority for the disclosures that will be necessary to conclude on-going examination issues involving the various corporate entities after the reorganization of the Old [REDACTED] consolidated group is found in section 6103(e)(1)(D) in conjunction with section 6103(e)(7). Specifically, Old [REDACTED] has authority to receive returns and return information of itself and all consolidated subsidiaries on the theory that each member of a consolidated group may have access to the return or return information of the consolidated group as long as it was a member of the consolidated group for the period covered by the consolidated return, or during the period to which the consolidated return information relates. Yorkshire v. Internal Revenue Service, 829 F.Supp. 1198 (C.D. Cal.1993), aff'd 26 F.3d 942 (9th Cir. 1994).

New [REDACTED] has authority as the current parent of the consolidated subsidiary group to obtain all returns and return information of any of its subsidiaries (including everything from the Old [REDACTED] consolidated group which is considered the information regarding the several liability of its subsidiaries with regard to the consolidated tax of the Old [REDACTED] consolidated group).

- Finally, based on our discussions with the National Office prior to our February 8, 1999 response, we recommended that a Power of Attorney be obtained from Old [REDACTED] designation New [REDACTED] its agent for purposes of the on-going examination. Upon further reflection the National Office does not believe that you should obtain such a Power of Attorney. The rationale underlying this conclusion is that Old [REDACTED] would have to indicate on the Power of Attorney that it, in its role as agent for the consolidated group, is authorizing New [REDACTED] to

be an agent for Old [REDACTED]. Essentially, Old [REDACTED] would be authorizing New [REDACTED] to be the agent of the agent (i.e., Old [REDACTED]). This concept, "the agent of an agent," has not directly been tested in the courts, with the only possible exception being Alumax v. Commissioner, 109 T.C. 133, 196-199 (1997).

#### CONCLUSIONS

As reflected herein, with the exception of our recommendation that a Power of Attorney be obtained from Old [REDACTED], the National Office agrees with the advice provided in our February 8, 1999 memorandum.

If you have any question regarding this supplement or our February 8, 1999 memorandum or want to discuss this issue further, please contact Karen E. Chandler directly at (202) 634-5403, ext. 224.

  
BETTIE N. RICCA  
Associate District Counsel

Office of Chief Counsel  
Internal Revenue Service

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date: FEB - 8 1999

to: [REDACTED], Case Manager, [REDACTED]

from: Associate District Counsel, Delaware-Maryland District,  
Washington, D.C.

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subject: [REDACTED] - [REDACTED] Reorganization  
Effect on Representation

This is in response to your request for advice regarding the proper party to deal with concerning the [REDACTED] consolidated group's income tax liabilities for the years following [REDACTED]'s [REDACTED] corporate reorganization. You currently have under examination the consolidated income tax returns filed for the calendar years ending December 31, [REDACTED], December 31, [REDACTED] and December 31, [REDACTED].

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ISSUES

Following [REDACTED]'s [REDACTED] reorganization, for the years currently under examination:

1. Who is the proper party to execute an extension of the statute of limitations?

2. Who is the proper party to execute a partial or complete settlement of proposed adjustments?
3. To what entity(ies) should a notice of deficiency be sent?
4. What, if any, disclosure limitations exist relating to the former members of the [REDACTED] consolidated group or the newly formed current parent of those former members in requesting information or discussing proposed adjustments?

### FACTS

In January, 1998, the Examination Team held an opening conference with the [REDACTED] (hereinafter "Old [REDACTED]") regarding the examination of its [REDACTED], [REDACTED] and [REDACTED] consolidated federal tax returns. As of that date and during the years under examination, Old [REDACTED] was the common parent of an extensive group whose affiliates joined in filing consolidated federal income tax returns. Old [REDACTED], directly and through its wholly owned subsidiaries was engaged in three businesses:

1. [REDACTED]  
(hereinafter "Business A");
2. [REDACTED]  
[REDACTED]  
(hereinafter "Business A1"); and,
3. [REDACTED]  
[REDACTED]  
[REDACTED] (hereinafter "Business B").

Prior to [REDACTED], [REDACTED], a [REDACTED] corporation, also engaged in Business B and Old [REDACTED] entered negotiations to combine their B businesses. After receiving a February 12, 1998 letter ruling, Old [REDACTED] undertook a spin-off of its A and A1 businesses to facilitate its proposed transaction with [REDACTED]. Old [REDACTED]'s spin-off consisted of creating a new subsidiary (subsequently "New [REDACTED]") to which it transferred all of the assets used in Business A and its wholly owned subsidiaries conducting Business A1 in exchange for New [REDACTED] stock. The stock of New [REDACTED] was distributed to Old [REDACTED]'s shareholders pro rata.

New [REDACTED]'s headquarters is currently located at the corporate offices occupied by Old [REDACTED] prior to the [REDACTED] reorganization. This is the location of the IRS Examination Team auditing the consolidated returns of the Old [REDACTED] group for the years [REDACTED] through [REDACTED]. In it's new configuration as the parent corporation of a group consisting of former subsidiaries in Business B and [REDACTED] subsidiaries engaged in business B, Old [REDACTED]'s headquarters are presently located in [REDACTED].

In connection with the [REDACTED] reorganization a Tax Sharing and Indemnification Agreement (hereinafter "Agreement") was entered by Old [REDACTED], New [REDACTED] and [REDACTED]. That Agreement provides, among other things, that:

1. Generally, New [REDACTED] is liable for any tax deficiency for the years currently under examination, or is entitled to any refund attributable to those years;
2. Whenever New [REDACTED] becomes aware of an issue which could increase any tax liability of Old [REDACTED] or any member of its current group, New [REDACTED] is required to notify Old [REDACTED]. Conversely, whenever Old [REDACTED] becomes aware of an issue which could increase any tax liability of New [REDACTED] or any member of its current group, Old [REDACTED] is required to notify New [REDACTED];
3. New [REDACTED] has primary responsibility for conducting any audit for the years currently under IRS examination and for conducting any subsequent litigation relating thereto;
4. Old [REDACTED] is required to cooperate with, and provide information to, New [REDACTED] relating to any audit of the years currently under IRS examination. In this regard Section 4.05 (b) of the Agreement provides:

... It is expressly the intention of the parties to this Agreement to take all actions necessary to establish [REDACTED] [New [REDACTED]] as the sole agent for tax purposes of each member of the Affiliated Group with respect to all combined, consolidated and unitary Tax

Returns of the Affiliated Group for Pre-Distribution Taxable Periods as if

██████████ [New ██████████] were the common parent of the Affiliated Group, and as the sole agent for tax purposes ...

5. New ██████████ is the designated owner of all Tax Returns, related schedules and workpapers, and all material records and other documents relating to those Tax Returns for the periods currently under IRS examination.

### DISCUSSION

#### Old ██████████

Section 1501 of the Code grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in section 1502. See I.R.C. § 1501. Under those regulations, the common parent of the consolidated group is the sole agent for the members of the group with respect to the consolidated tax liability of the group.

Treas. Reg. § 1.1502-77(a) provides that the common parent "shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." The common parent, i.e. Old ██████████, remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. See Treas. Reg. § 1.1502-77(a). See also, Craigie, Inc. v. Commissioner, 84 T.C. 466, 472 (1985); Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

Old ██████████ as the common parent prior to the ██████████ restructuring, is the sole agent of the consolidated group for the years currently under examination. Treas. Reg. § 1.1502-77(a). As the common parent for the consolidated return years under examination, Old ██████████ remains the common parent agent for purposes of extending the statute of limitations with respect to those years even though it is no longer the common parent of all



of the subsidiaries. Treas. Reg. § 1.1502-77(c); Lone Star Life Ins. Co. v. Commissioner, T.C. Memo. 1997-465. Consequently, as necessary, Form(s) 872 (Consent to Extend the Time to Assess Tax) should be executed by Old [REDACTED] to extend the statute of limitations.

As the continuing common parent for the consolidated years under examination, Old [REDACTED] also remains the proper party to execute Forms 870 (Waiver of Restrictions on Assessment and Collection).

Treas. Reg. § 1.1502-77(a) explicitly provides, in part, "notices of deficiencies will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each subsidiary in the group." As the continuing common parent for the consolidated years under examination, Old [REDACTED] is the proper entity to receive any notice of deficiency for the years currently under examination. Treas. Reg. § 1.1502-77(a); Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).

**New [REDACTED]**

New [REDACTED], having directly received assets from Old [REDACTED], is liable to the extent of the value of those assets as a transferee. I.R.C. § 6901; Treas. Reg. § 301.6901-1(b); IRM § 4582.21(6); Southern Pacific Transportation v. Commissioner, 84 T.C. 367 (1985). Additionally, in the Tax sharing and Indemnification Agreement, New [REDACTED] contractually obligated itself to pay the consolidated federal tax liabilities for the consolidated years currently under examination. Article II, Section 3.01 of the Agreement. That Agreement renders New [REDACTED] liable as a transferee at law. Southern Pacific Transportation v. Commissioner, Id.; Southern Pacific Transportation v. Commissioner, 84 T.C. 387 (1985).

In addition to the Forms 872 executed by Old [REDACTED], a Forms 872 executed by New [REDACTED] should be obtained to cover its potential primary liability as the transferee at law of assets. Further, because of New [REDACTED]'s potential secondary liability, Forms 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary) executed by New [REDACTED] should be obtained to extend the statute of limitations as to transferee liability. See, I.R.C. § 6901(d)(1); Treas. Reg. § 301.6901-1(d)(1); IRM § 4582.21(5).

In addition to Forms 870, a Form 2045 (Transferee Agreement) executed by New [REDACTED] as to its potential transferee liability should be obtained as to any partial or complete settlement. See, IRM § 4582.21(4).

If a Notice of Deficiency is sent to Old [REDACTED], a Notice of Transferee Liability should also be sent New [REDACTED]. This is consistent with the agreement between Old [REDACTED] and New [REDACTED] that New [REDACTED] will be liable for any tax deficiency for the years currently under examination.

### Disclosures

Section 6103(k)(6) of the Internal Revenue Code provides:

An internal revenue officer or employee may, in the course of his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, the amount to be collected or with respect to the enforcement of any provision of this title.

See also, Treas. Reg. § 301.6103(k)(6)-1(b).

To the extent concerns exist regarding disclosures to New [REDACTED], this provision of I.R.C. §6103 is applicable. As New [REDACTED] has the relevant records, it is appropriate to discuss issues and request necessary information from New [REDACTED].

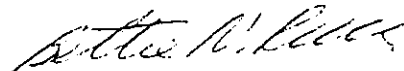
The Agreement between Old [REDACTED] and New [REDACTED] provides that New [REDACTED] has primary responsibility for the current audit and has possession of all of the relevant records. Consistent with the Agreement, and to forestall any future confusion, a Power of Attorney from Old [REDACTED] designating New [REDACTED] its agent for purposes of the on-going examination should be obtained.

### CONCLUSIONS

1. Old [REDACTED] is the proper party to execute Form(s) 872 to extend the statute of limitations. Form(s) 872 and 977 executed by New [REDACTED] should also be obtained to extend the statute of limitations as to its primary and transferee liability.

2. Old [REDACTED] is the proper party to execute Form(s) 870 reflecting any partial or complete settlement of proposed adjustments. Form(s) 2045 executed by New [REDACTED] should also be obtained to reflect its agreement to such settlement.
3. Any notice of deficiency should be sent to Old [REDACTED]. A notice of transferee liability should be sent to New [REDACTED].
4. Disclosure relating to the former members of the [REDACTED] consolidated group or the newly formed current parent of those former members in requesting information or discussing proposed adjustments is not limited. We recommend that, consistent with the agreement between Old [REDACTED] and New [REDACTED], a Power of Attorney be obtained from Old [REDACTED] designating New [REDACTED] its agent for purposes of the on-going examination.

This advisory is being post reviewed by the National Office. We will advise you if they have any comments. If you have any question regarding this memorandum or want to discuss this issue further, please contact Karen E. Chandler directly at (202) 634-5403, ext. 224.



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